PUBLIC PROSECUTOR

v.

LENG CHOW TENG

FEDERAL COURT, KUALA LUMPUR
GEORGE SEAH FJ
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CRIMINAL REFERENCE NO. 3 OF 1979]
12 DECEMBER 1984

CRIMINAL LAW AND PROCEDURE: *Plea of guilty made by accused but without notice and in the absence of his Counsel - A guilty plea - Whether lawful and thereby recorded but not accepted by Court.*

The case was referred to the Federal Court at the instance of the Public Prosecutor under s. 66 Courts of Judicature Act 1964 which reads:

> Whether a plea of guilty is good in law when made by the accused in person, but without notice to and in the absence of his Counsel after the charge has been read and explained to him and he understood the nature and consequences of his plea.

The respondent was charged in the Magistrate's Court for possession of opium and utensils for smoking opium allegedly committed on 17 July 1978. The respondent was represented and claimed trial. The hearing date was fixed for 15 February 1979. The case was then postponed to 9 August 1979. In the intervening period, the case was brought forward without notice to the respondent's Counsel and the respondent pleaded guilty in the absence of his Counsel.

The respondent's Counsel wrote a letter of complaint to Harun J and the learned Judge thereafter exercised his power of revision as to the legality of the conviction. The learned Judge was of the view that the respondent was prejudiced by the failure of the Court to notify respondent's Counsel and held that the plea of guilty was bad in law.

Held:

[1] Any plea must in all cases be made by the accused personally irrespective of whether he is unrepresented or represented by Counsel. The only exception is where the charge is made under a statute and that statute expressly allows the accused to plead guilty by letter.

[2] The recording of a plea of guilty is distinguishable from the acceptance of such plea by the Court is recognised in s. 173(m)(2) Criminal Procedure Code. Before a plea of guilty is recorded and accepted, the Court should:

(i) ascertain that the accused understand the nature and consequences of his plea.
(ii) where represented, enquire why his Counsel is absent.

Once a guilty plea is made, the Court has a discretion not to convict him with a view to admonish him or put him on a bond of good behaviour.

[3] Where accused is represented, the Court should be put on guard whenever the accused changes his plea from not guilty to guilty in the absence of his Counsel.

[4] In this case, although the respondent's plea of guilty was lawful and therefore should be recorded, the Court should not accept the plea.

[Appeal dismissed.]

Cases referred to:
R v. Tan Thian Chai [1932] MLJ 74
R v. Hayes 34 Cr App R 61

Legislation referred to:
Courts of Judicature Act 1964, s. 66.
Criminal Procedure Code, s. 173, (a), (b), (m)(2), A(ii)
Federal Constitution, art. 5(3).

For the applicant -Tee Hong Geok, DPP
For the respondent absent (not served)

JUDGMENT

Mohd. Azmi FJ:

At the instance of the Public Prosecutor, the following question of law of public interest has been referred to us under s. 66, Courts of Judicature Act 1964:

> Whether a plea of guilty is good in law when made by the accused in person, but without notice to and in the absence of his Counsel after the charge has been read and explained to him and he understood the nature and consequences of his plea.

The respondent was charged in the Magistrate's Court, Kuala Lumpur on two counts under the Dangerous Drugs Ordinance 1952 for possession of opium and utensils for smoking opium, both offences were alleged to have been committed on 17 July 1978. The respondent appeared in Court with Counsel on 17 August and claimed trial to both the charges. A date of hearing was fixed for 15 February 1979 and as usual bail was granted. The case was however postponed to 9 August 1979 and when Counsel appeared on that date, he was informed that the case against his client had been brought forward and his client (the respondent) had apparently pleaded guilty in person on 4 July 1979 without the Counsel being notified, and was sentenced to 8 months' imprisonment on the first charge and 3 months on second charge, both sentences to run with retrospective effect from 15 February 1979 - the date when the accused was apparently put on remand, notwithstanding the bail granted by the Court and executed by the respondent.

The record of the criminal proceeding was called up by Harun J for the purpose of satisfying himself as to the correctness, legality and propriety of the conviction with a view to exercising his power of revision under Chapter XXXI Criminal Procedure Code, after he had received a letter of complaint from Mr. Kanesalingam, Counsel for the respondent. After hearing submission of Mr. Kanesalingam and the Deputy Public Prosecutor, the learned Judge quashed the conviction and set aside the sentences, and he also held that no retrial should be ordered. Hence the present reference on question of law to this Court.

In his written judgment, the learned Judge observed that it was clear that the lower Court proceeded to hear the case on 4 July 1979 without first informing Counsel who represented the accused in Court on 17 August 1978 and 15 February 1979. He was of the view that this was wrong and went on to state that if an accused person was represented by Counsel, no part of the Court proceedings should be held in the absence of Counsel or without first giving an opportunity to Counsel to be present, and if this procedure was not followed it would deprive an accused person the right to be defended by a legal practitioner of his choice as guaranteed by Article 5(3) of the Federal Constitution. He therefore held that the plea of guilty in the absence of Counsel was bad in law.

In our view any plea must in all cases be made by the accused personally irrespective of whether he is unrepresented or represented by Counsel (see *R v. Tan Thian Chai* [1932] MLJ 74). It is not sufficient for Counsel to say that the accused wishes to claim trial or to plead guilty. The accused must himself plead (see *R v. Hayes* 34 Cr App R 61). The only exception is where the charge is preferred under statute which expressly allows the accused to plead guilty by letter. This requirement for the accused himself to make a plea and not merely through his Counsel is implicit in sub-sections (a) and (b) of s. 173 CPC which provide:

> (a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.
>
> (b) If the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

The recording of plea of guilty as distinguished from the acceptance of such plea by the Court is also recognized in s. 173(m)(2) CPC, the relevant part of which provides: "... if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law". Thus, a plea made by the accused in person is not only good in law but also required by law except where a plea of guilty by letter is expressly provided for in any written law. But before a plea of guilty is recorded and accepted it is mandatory under sub-section 173 (b) for the Court to ascertain that the accused understands the nature and consequences of his plea and that he intends to admit without qualification the offence alleged against him. The words "may be convicted thereon" in sub-section 173 (b) and the words "shall ascertain" in the proviso clearly envisage two different meanings and requirements. The sub-section provides that even if the accused pleads guilty the Court has a discretion not to convict him with a view to admonish him or to put him on a bond of good behaviour under s. 173A(ii) CPC, but as in all cases of discretionary powers it must be exercised judicially. The requirement in the proviso before a plea of guilty is recorded and accepted is clearly mandatory. For such ascertainment, it is our view that apart from an enquiry from the accused himself, it is necessary for the Court to enquire why his Counsel is absent where one is still on record and has not been discharged. Where the records show that the accused is represented, the Court should be put on guard whenever the accused changes his plea from not guilty to one of guilty in the absence of his Counsel particularly in a case where the offence with which he is charged and to which he has pleaded guilty would likely attract a term of imprisonment. In the present case we think it is obvious that the President sitting as a Magistrate had overlooked two important factors before recording and accepting the plea of guilty by the respondent. Firstly, either the President had overlooked the fact that the respondent was represented, or having recognized that the respondent was represented he failed to direct his mind and to enquire why the Counsel was absent. Had he done so and checked the record of proceedings, he would have discovered that the date of hearing had been brought forward to 4 July without Counsel's knowledge. Secondly, on the day the respondent pleaded guilty he had been wrongly remanded for five months in spite of having been granted bail and having executed a bail bond, and as such he could not have had the advantage of any legal advice from his Counsel when he changed his plea from not guilty on 17 August 1978 to one of guilty on 4 July 1979. In these circumstances we think it could not have been possible for any Court to be satisfied that the respondent had really understood the nature and consequences of his plea of guilty and that he intended to admit

the offences alleged against him without qualification. Indeed, the learned DPP Encik Mohd. Shafie had conceded before the learned Judge that in the circumstances of this case an injustice had been done to the respondent. We entirely agree with the learned DPP's concession and we think there is in fact a miscarriage of justice in this particular case. Be that as it may, we are of the view that a plea of guilty by the accused under sub-section 173(b) CPC in the absence of his Counsel is not unlawful. The plea should be recorded but not accepted. Thus, whilst the plea itself is perfectly lawful, the acceptance of such a plea in the absence of Counsel is bad in law as without Counsel's advice the accused could not be said to have understood the nature and consequences of his plea or to have intended to admit without qualification the offences alleged against him. Our answer to the question posed by the Public Prosecutor is therefore in the positive but subject to an important qualification that such plea of guilty should only be recorded but not accepted unless the Court is satisfied that the absence of Defence Counsel has been properly accounted for.

Also found at [1985] 1 CLJ 157